**GANESAN RAMACHANDRAN & ANOR.**

**v.**

**WONG WAN HENG**

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL SUIT NO. 284 OF 1978]
10 JANUARY 1985

***TORT:*** *Negligence - Determining liability - Conflicting evidence from the plaintiff and defendant - Plaintiff's witness corroborated his evidence - Defendant found negligent and fully liable.*

The first plaintiff was involved in a collision with the defendant. The evidence of the plaintiff indicated that he was sitting astride on his bicycle and remaining stationary while waiting to cross the road when a car driven by the defendant knocked into him. The plaintiff sustained injuries involving loss of his right leg which was amputated. The plaintiff's evidence was corroborated by an eye-witness.

The defendant however claimed that the plaintiff was overtaking another cyclist and had swerved resulting in the car driven by the defendant colliding with the cyclist.

**Held:**

**[1]** The defendant's inability to avoid the plaintiff even though he was aware of his presence was an act of negligence *simpliciter* and would at once raise the question as to the defendant's fitness as a driver.

**[2]** The evidence of the plaintiff and his witness was accepted on a balance of probabilities against the evidence of the defendant.

*[Defendant held wholly liable.]*

*For the plaintiffs - V. Balasingam; M/s. Joseph & Son*
*For the defendant - S. Kanagasabapathi; M/s. R.K. Nathan & Co.*

**JUDGMENT**

**Peh Swee Chin J:**

An accident took place at about 6 p.m. on 25 April 1978 in Jalan Rahang, one of the busiest roads in Seremban town between the plaintiff, a cyclist and the defendant, a motorist, in front of a Shell petrol service station.

According to the plaintiff, he was waiting on the left edge of the road as one faced the town centre, waiting to cross Jalan Rahang to the other side of the road, looking to the left and right with the front wheel of his bicycle on the metalled road and the rear wheel on the side table. He was astride his bicycle with his left foot on the ground and the right foot on the right pedal of the bicycle. He then saw a car coming from his right-hand side towards him and it knocked into him on his right leg. He sustained injuries involving the loss of his right leg which was amputated in hospital.

When cross-examined, he said the car was 15 to 20 ft. away when he first saw it; it was coming normally but fast. He had waited for about five minutes before the collision. He denied having been knocked down in the course of crossing the road.

In his evidence, the cyclist was supported by an eye-witness, PW2. PW2 said he was on duty as a pump attendant in the Shell petrol station facing the road, i.e. Jalan Rahang. He saw the cyclist on the left side of the road as one faced the town centre, i.e. on the other side of the road from the Shell petrol station. He saw the car of the said motorist coming from the direction of Tampin towards the Seremban town centre. At the same time, he said to the effect that a dog was crossing the road from the right-hand side of the road to the left- hand side as one faced the town centre. The motorist, wanting to avoid the dog, swerved to the left-hand side as one faced the town centre, knocked into the cyclist there, and dragged the bicycle towards the centre of the road where it was thrown (off) in front of the car. Prior to the accident, the bicycle was stationary with the front wheel on the metalled road. He did not hear any horn being sounded.

When cross-examined, he denied that he was lying. He said he did inform the police and lawyer about the dog. The car was travelling at 50 to 60 miles per hour. The speed was a guess of his. Despite rather severe cross-examination, he stuck to his story. He demonstrated that the car had swerved back towards the middle of the road, dragging the bicycle along with it.

The motorist, about 20 years old at the time of the accident, said he was travelling at about 30 to 40 miles per hour. He saw two bicycles in front of him, about 50 to 80 ft. away when he first saw them. When about 5 ft. away, one of the bicycles swerved out to its right, resulting in the near-side front of his car colliding with the bicycle at an angle. When the bicycle moved out, he tried to avoid it by swerving to his right, but he saw an on-coming lorry and he could not do anything to avoid the bicycle. The cyclist landed inside his car through the windscreen of the car. He denied he had swerved to his left because a dog was running across the road, thereby knocking into the cyclist who was stationary.

When cross-examined, he said at the time of swerving out, one of the two cyclists had overtaken the other and swerved out. He said when he saw the cyclist swerve to his right, he swerved to his right also, for about 6 to 7 ft. to his right. He did not apply his brakes because if the cyclist had stopped, he could pass the cyclist safely. When the cyclist swerved to his right, he did not anticipate that the cyclist would swerve further. After the collision he jammed on his brakes. The cyclist was travelling fast. He did not know whether his car had dragged the bicycle after the impact. When he came to a halt, the bicycle was in front of his car.

The sketch plan showed the width of the road to be 62 ft. and the car to have stopped near the centre line with the front portion slanting towards its left edge of the road. One half of the road would be about 31 ft. wide. A pool of blood was found 11' 2" from the left edge and glass fragments were scattered mostly on the left half but on the right half of the road in front of the car.

Both the driver and cyclist lodged reports which confirmed their stories respectively as told in Court.

It was fortunate for the cyclist that there was an independent eye-witness who gave evidence in this case. Despite very severe cross-examination on the line that he was lying, he remained unshaken. He was not challenged that he was not working in the Shell petrol station opposite the scene of the collision. I found him a truthful witness from whom the police had taken a statement and who was subpoenaed for the case. He corroborated the evidence of the cyclist that the driver had swerved to his left, knocking into the cyclist who was waiting to cross the road. There was a discrepancy however between his evidence and the cyclist on what

appeared at first sight to be a material point i.e. the cyclist did not see the dog running across the road from the right side to the left as one faced the town centre. After considering this discrepancy, I did not think it was after all a material one and it would not jar with common sense and could in fact have the paradoxical effect of strengthening the case for the cyclist. The cyclist before the accident was looking to his right to look at the car coming from his right, and one could safely assume that this and the dog's crossing all happened at the same time. It was probable that he was looking to his right at the car coming from his right because he was waiting to cross the road. Being so occupied, it was not unreasonable for him not to have seen the dog's crossing. If the similarities of the evidence of this eye-witness and the cyclist had attracted criticism from defence counsel for being unreliable or contrived, such dissimilar evidence about the dog could very well have sounded true. If the cyclist had been a liar, it would have been easy for the cyclist to tow the line and be word-perfect in his evidence by mentioning the dog's crossing. Further the cyclist impressed me as a witness far more reliable than the driver.

The sketch plan was ambiguous and by no means helpful in that it could be consistent with either the story of the driver or that of the cyclist, thus possessing, curiously enough, a quality which counsel in running-down cases are wont to attribute to it, though in a different sense here, i.e. its quality of neutrality.

I therefore accepted the evidence of the plaintiff and PW2 on a balance of probabilities, as against the evidence of the defendant. I was satisfied that, as stated to the effect by both the plaintiff and PW2, the defendant was driving at a speed excessive in the circumstances, and as the resident Judge in Seremban, I felt no qualm in regarding the heavy traffic on Jalan Rahang, as sufficiently notorious. On and very shortly after the impact, the force of it was so great that the plaintiff was catapulted into the air, with the plaintiff smashing the windscreen of the car and with sufficient momentum to and did land inside the car as a passenger and though meant to be such, a kind of impact of such force that one would normally associate with those happening on a fast express highway outside town area. This by itself would, in my view, be sufficient to affix total liability on the defendant. Again the defendant was aware of the 1st plaintiff's presence some distance away before the accident, yet to swerve towards him in order to avoid a dog running across the road in front of the defendant, could also be an act of negligence *simpliciter* and would at once raise a question as to the defendant's fitness as a driver. I therefore found the defendant wholly liable and gave judgment accordingly.

Since the appeal of the defendant is limited to the question of liability and not quantum, I will not deal with the latter.

Also found at [1985] 1 CLJ 273